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No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

MOTION FOR LEAVE TO FILE AMENDED PETITION FOR AN APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS AND FOR THE ASSERTION OF NEW CLAIMS, AMENDED PETITION FOR AN APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS AND FOR THE ASSERTION OF NEW CLAIMS, AND BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE AMENDED PETITION FOR AN APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS AND FOR THE ASSERTION OF NEW CLAIMS

DON STENBERG
Attorney General of Nebraska
Department of Justice
State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN
JAY F. STEIN

Simms & Stein, P.A.
446 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880

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APPENDIX

No. 108, Original

IN THE

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October Term, 1986

STATE OF NEBRASKA,
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v.

STATE OF WYOMING,
Defendant.

MOTION FOR LEAVE TO FILE AMENDED PETITION FOR AN APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS AND FOR THE ASSERTION OF NEW CLAIMS

The State of Nebraska hereby moves for leave to file its amended petition for an equitable apportionment of the unapportioned, non-irrigation season flows of the North Platte River, to assert new claims against the State of Wyoming and the United States in relation to violations of the Decree entered in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953), for an order continuing and enforcing the Decree, and for injunctive relief against the State of Wyoming and the United States.

Respectfully submitted,

DON STENBERG
Attorney General of Nebraska
Department of Justice
State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

RICHARD A. SIMMS

Counsel of Record
Special Assistant Attorney General
JAMES C. BROCKMANN
JAY F. STEIN
Simms & Stein, P.A.
446 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880

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v.

STATE OF WYOMING,
Defendant.

AMENDED PETITION FOR AN APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS AND FOR THE ASSERTION OF NEW CLAIMS

The State of Nebraska hereby petitions the Court for: Count I) An amended decree equitably apportioning the previously unapportioned, non-irrigation season flows of the North Platte River, *i.e.*, those occurring between October 1 and April 30, and for injunctive relief against the State of Wyoming; Count II) an order construing and enforcing the Decree in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953), and for injunctive relief against the State of Wyoming; and Count III) an order construing and enforcing the Decree in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953), and for injunctive relief against the United States.

The Court has jurisdiction of this controversy pursuant to U.S. CONST. art. III, § 2, which provides: "In all Cases . . . in which a State shall be a Party, the Supreme Court shall have original jurisdiction," and 28 U.S.C. § 1251(a)(1988), which provides: "The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States." In addition, the Court

expressly retained jurisdiction to resolve the present controversy in ¶ XIII of the Decree, which provides:

> The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but not be limited to, the following:
>
> * * *
>
> (f) Any change in conditions making modification of the decree or the granting of further relief necessary or appropriate.

325 U.S. at 671-72.

COUNT I

1. The Decree in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953), completely apportioned the natural flows of the North Platte River between the states of Nebraska and Wyoming during the irrigation season and partially apportioned the natural flows of the river during the non-irrigation season.

2. The Decree specifies the State of Colorado's equitable apportionment in its entirety, during the irrigation season and during the non-irrigation season.

3. The decision and the Decree partially apportioned the natural flows of the North Platte River during the non-irrigation season by regulating the storage or accrual of natural flow by:

a. Enjoining Wyoming from storing more than 18,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries above Pathfinder Dam during each water year, *i.e.*, October 1 through September 30;

b. Enjoining Colorado from storing more than 17,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries in Jackson County, Colorado, during each water year;

c. Enjoining Wyoming from storing water out of priority with respect to specified reservoirs, excepting out of priority storage or releases from Seminoe Reservoir for the generation of electricity if such storage or releases do not materially interfere with irrigation by the French and State Line canals;

d. Enjoining Colorado from exporting more than 60,000 acre feet of water out of the basin of the North Platte River and its tributaries in Jackson County, Colorado, in any period of 10 consecutive years; and

e. Apportioning the accrual of 46,000 acre feet during the months of October, November, and April to Nebraska for storage in the Inland Lakes for the irrigation of 10,748 acres of land.

4. Except as specified in ¶ 3, *supra*, the decision and the Decree in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953), do not equitably apportion the non-irrigation season flows of the North Platte River, notwithstanding that the Court sought to balance the equities among Nebraska, Wyoming, and Colorado to provide certainty and resolve future disputes.

5. In *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953), the Court exercised its jurisdiction over the waters of the North Platte and Platte rivers from North Park, Colorado, to Grand Island, Nebraska.

6. The North Platte Project, a United States Bureau of Reclamation project located in the North Platte River Basin in Wyoming and Nebraska, consists of several storage reservoirs and a series of canals for the purpose of irrigating lands in Nebraska and Wyoming. *See* Appendix 1. It was built in the early 1900's for the reclamation and irrigation of large tracts of land. As the reservoirs began storing

water, the historical regimen of the river changed. The reservoirs provide storage water which is transported through canal systems for direct diversion on irrigated land. Additionally, large quantities of return flows are derived from Project irrigation.

7. Return flows from the North Platte Project created a new regimen of the river downstream from Tri-State Dam, a diversion dam located in Nebraska near the Nebraska-Wyoming state line, in the approximate amount of 700,000 to 750,000 acre feet annually. *See* Appendix 1.

8. Based upon the regimen of the river resulting from the return flows from the North Platte Project, as well as the construction of the Tri-County (Lake McConaughy) and Sutherland projects downstream of Bridgeport, Nebraska, the State of Nebraska withdrew its claim to direct flows during the irrigation season for irrigators with diversions between Bridgeport and Grand Island, Nebraska, in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953). *See* Appendix 1.

9. Because there were adequate "local supplies," consisting principally of return flows from the North Platte Project, Special Master Doherty and the Court in *Nebraska v. Wyoming*, 325 U.S. 589, *modified*, 345 U.S. 981 (1953), denied an apportionment to Nebraska for direct flows during the irrigation season between Tri-State Dam and Bridgeport. *See* Appendix 1. Consequently, direct flows below Tri-State Dam were not expressly apportioned to Nebraska during the irrigation season.

10. The unapportioned, non-irrigation season flows of the North Platte River which have historically flowed into Nebraska are of major importance to the State of Nebraska downstream of Tri-State Dam.

11. Unapportioned, non-irrigation season flows and undiverted irrigation season flows of the North Platte River are collected in Lake McConaughy. Lake McConaughy is located on the North Platte River in western Nebraska above the confluence of the North Platte and South Platte

rivers. *See* Appendix 1. Lake McConaughy was expressly designed to capture return flows from the North Platte Project in order to irrigate farmland and to generate hydropower.

12. Between water years 1946-1987, the average annual inflow into Lake McConaughy was 1,105,000 acre feet.

13. Flows entering Lake McConaughy during the seven month non-irrigation season have averaged 455,000 acre feet or 41% of the total water supply to Lake McConaughy, 1946-1987.

14. Flows entering Lake McConaughy during the five month irrigation season have averaged 650,000 acre feet or 59% of the total water supply to Lake McConaughy, 1946-1987.

15. On an average annual basis, 1946-1987, 347,500 acre feet of water have historically entered Nebraska from Wyoming in the form of undiverted, inchannel natural flows passing Tri-State Dam.

16. On an average annual basis, 1946-1987, 736,000 acre feet of return flows have historically entered the North Platte River in Nebraska between Tri-State Dam and Bridgeport, derived from direct diversions for irrigation at or above Tri-State Dam.

17. The unapportioned, non-irrigation flows and the undiverted, irrigation season flows which enter Lake McConaughy are subsequently used for irrigation of crops during the irrigation season, generation of hydroelectric power, municipal use, and for fishing, hunting, boating, and waterfowl, fish, and other wildlife habitat. These uses are made possible principally through the operation of Lake McConaughy and other associated projects owned by Central Nebraska Public Power and Irrigation District ("CNPPID") and the Nebraska Public Power District ("NPPD") located between Lake McConaughy and the return of CNPPID's canal system below Lexington, Nebraska. The projects have given rise to post-Decree uses of those flows between Lake

McConaughy and Grand Island, Nebraska. In addition to the habitat along the river, these uses include wildlife habitat throughout both districts' systems, whose features include Lake McConaughy, Kingsley Hydro, Sutherland Reservoir, Gerald Gentleman Station, Lake Maloney, North Platte Hydro, Jeffrey Reservoir, Jeffrey Hydro, Central Lake, Johnson Lake, Johnson Hydros #1 and #2, Canaday Station, and numerous other lakes and wetlands along the supply canals and laterals.

18. Since the entry of the Decree, the unapportioned, non-irrigation season flows of the North Platte River have been and continue to be relied upon by equitable interests in the State of Nebraska, including irrigation, hydroelectric power production, water cooled electric power production, municipalities, recreation, and fish and wildlife, including federally endangered and threatened species.

19. Wyoming has numerous proposals for upstream development in the North Platte River Basin which would utilize and consume the unapportioned, non-irrigation season flows.

20. It is necessary to apportion the unapportioned, non-irrigation season flows of the North Platte River to protect downstream equities in Nebraska from upstream development in Wyoming which threatens to deplete these critical but unprotected non-irrigation season flows.

21. The resolution of the issues presently pending in this action will necessarily affect the unapportioned, non-irrigation season flows of the North Platte River.

22. In the pending original action, *Nebraska v. Wyoming*, No. 108, Original, the State of Nebraska alleges that Wyoming is presently violating and threatens to violate the State of Nebraska's equitable apportionment established in the Decree by:

a. Depleting the flows of the North Platte River by the operation of Grayrocks Reservoir on the Laramie River, a tributary of the North Platte River;

b. Depleting the flows of the North Platte River by the proposed construction of additional river pumping, diversion, and storage facilities at the confluence of the Laramie and the North Platte rivers;

c. Depleting the natural flows of the North Platte River by the proposed construction of storage capacity on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir; and

d. Actions by state officials to prevent the United States Bureau of Reclamation's continued diversion of North Platte waters in Wyoming through the Interstate Canal for storage in the Inland Lakes in Nebraska for the benefit of water users in the State of Nebraska.

23. Because of the hydrologic continuity that exists on the North Platte River, actions in Wyoming which deplete the water supply and violate the Decree during the irrigation season also deprive downstream equities in Nebraska of non-irrigation season water upon which they rely and to which the State of Nebraska is equitably entitled.

24. The State of Wyoming is presently depleting and threatens further depletions of the unapportioned, non-irrigation season flows of the North Platte River to which Nebraska is equitably entitled by:

a. Depleting the flows of the North Platte River by the proposed construction of additional river pumping, diversion, and storage facilities at the confluence of the Laramie and the North Platte rivers;

b. Claiming the right to dry up the Laramie River at its mouth year-round;

c. Depleting the natural flows of the North Platte River by the proposed construction of storage capacity on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir;

d. Actions by state officials to prevent the United States Bureau of Reclamation's continued diversion of North Platte waters in Wyoming through the Interstate Canal

for storage in the Inland Lakes in Nebraska for the benefit of water users in the State of Nebraska; and

e. Seeking to restrict Nebraska to arbitrary limitations on the application of North Platte waters to beneficial use on lands in Nebraska served by canals diverting at or above Tri-State Dam.

25. The Laramie River is a tributary of the North Platte River which enters the North Platte between Whalen Dam and Tri-State Dam. *See* Appendix 1. The average annual contribution of the Laramie River to the North Platte River during the non-irrigation season has been 39,600 acre feet, 1946-1987. The Grayrocks Project and the proposed Corn Creek Project are both in the Laramie River Basin and are subjects of Nebraska's pending petition.

26. In regard to the Grayrocks Project, as part of the Agreement of Settlement and Compromise dated December 4, 1978, entered into to settle *Nebraska v. Rural Electrification Administration*, 12 E.R.C. 1156 (D. Neb. 1978), *appeal dismissed*, 594 F.2d 870 (8th Cir. 1979), Basin Electric, the operator of the Grayrocks Project, guaranteed certain non-irrigation season, minimum instream flow releases on the Laramie River, down to its confluence with the North Platte River, for wildlife protection in exchange for Nebraska and other plaintiffs withdrawing their objections to the Project. Although encouraged to participate in order to resolve outstanding issues, Wyoming did not become a party to the litigation or to the Agreement of Settlement and Compromise.

27. As a non-party to *Nebraska v. Rural Electrification Administration*, the State of Wyoming has repeatedly asserted that it is not bound by the Agreement of Settlement and Compromise and that it is not obligated to honor the Agreement. Additionally, Wyoming state law cannot facilitate the protection of the releases provided by the Agreement. Wyoming maintains that it has the right to dry up the Laramie River at its mouth. Wyoming claims this right during the irrigation season, as well as during the non-

irrigation season, encompassing the guaranteed minimum releases to Nebraska required by the Agreement of Settlement and Compromise. Such circumstances and actions threaten Nebraska's equities and preclude certainty in the use of the non-irrigation season flows of the North Platte River.

28. The Corn Creek Project is a new irrigation project which has been proposed and planned for the Laramie River Basin in Wyoming. The project would deplete substantial quantities of water from the Laramie River, including non-irrigation season flows which currently flow into Nebraska, which are relied upon by Nebraska's equitable interests, and which are a part of Nebraska's equitable entitlement during the non-irrigation season.

29. Deer Creek is a tributary of the North Platte River and enters the North Platte between Pathfinder Dam and Guernsey Dam. *See* Appendix 1. Wyoming has proposed the construction of the Deer Creek Project and Nebraska has objected in its pending petition.

30. The proposed Deer Creek Project would deplete non-irrigation season flows upon which downstream equities in Nebraska currently rely and to which Nebraska is equitably entitled, as well as the irrigation season flows which Nebraska has addressed in the pending petition.

31. With regard to the Inland Lakes, since the entry of the Decree, the State of Nebraska has relied on the already apportioned, non-irrigation flows to the Inland Lakes for irrigation, recreation, and for waterfowl, fish, and other wildlife habitat. Wyoming's attempt to curtail the Inland Lakes' apportionment in the pending action could adversely affect the non-irrigation season flows into Nebraska.

32. The State of Nebraska relies upon the direct diversion of water by canals which divert at or above Tri-State Dam nearing historical quantities in order to maintain adequate return flows for subsequent use below Tri-State Dam. Wyoming's attempt to restrict the diversions to arbitrary limitations in the pending action threatens down-

stream equities in Nebraska which have historically relied upon such return flows, including flows during the non-irrigation season to which Nebraska is equitably entitled.

33. In addition to the need for an equitable apportionment of non-irrigation season flows caused by the threat of upstream development on downstream equities currently relying upon the water, and by the effect of the resolution of the pending issues on unapportioned, non-irrigation season flows, conditions which the Court anticipated may change have in fact changed, further necessitating the apportionment of non-irrigation season flows.

34. Based upon drought conditions, Special Master Doherty and the Court recognized that an average of at least 81,700 acre feet of inchannel natural flows would continue to pass Tri-State Dam as unavoidable operational loss during the irrigation season, all of which would be utilized in satisfaction of then existing downstream requirements.

35. Although a predicate of the Decree, 81,700 acre feet of inchannel natural flows will not continue to pass Tri-State Dam during the irrigation season, except for releases for flood control, due to a retrofit of the diversion dam in 1989 to prevent leakage and seepage losses.

36. The loss of inchannel natural flows which have historically passed Tri-State Dam during the irrigation season has deprived Nebraska's downstream equities of water upon which they have historically and until recently relied.

37. The current and imminent actions of the State of Wyoming, including the pending claims before the Court, as well as Wyoming's claimed but unspecified right to develop future uses, infringe upon Nebraska's equitable share of the North Platte River during the non-irrigation season.

38. Despite the State of Nebraska's efforts to resolve these matters, the State of Wyoming has refused to alter its actions and has continued in this suit to assert its alleged right to infringe upon Nebraska's equitable share of the North Platte River during the non-irrigation season.

39. The State of Wyoming's present and threatened actions are causing and will cause irreparable injury to the State of Nebraska and its citizens.

40. The State of Nebraska has no effective remedy at law to enforce its equitable rights against the State of Wyoming. A determination of each state's equitable share and injunctive relief is necessary to restrain further infringement by Wyoming on Nebraska's equitable share of the North Platte River.

WHEREFORE, the State of Nebraska prays that the Court equitably apportion the unapportioned, non-irrigation season flows of North Platte River between Nebraska and Wyoming, and that the Court enjoin the State of Wyoming from depleting Nebraska's equitable share of the North Platte River during the non-irrigation season.

COUNT II

1. The Decree in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953), completely apportioned the natural flows of the North Platte River between the states of Nebraska and Wyoming during the irrigation season and partially during the non-irrigation season. The Court's decision and Decree were premised upon certain legal and physical conditions that existed at the time of the original litigation. The equitable apportionment recommended by Special Master Doherty and adopted by the Court necessarily would be altered by subsequent changes to those legal and physical conditions, unless appropriate offsetting measures were taken. Since the entry of the Decree in 1945, the State of Wyoming has initiated and allowed changes in the legal and physical environment and has allowed the effects of subsequent changes to adversely affect the equitable apportionment made to Nebraska.

2. The State of Wyoming is presently violating and threatens to violate the State of Nebraska's equitable apportionment established in the decision and Decree by:

a. Depleting or permitting the depletion of natural flows of the North Platte River by adopting the so-called surplus water statutes in 1945, WYO. STAT. §§ 41-4-318 to 324 (1977), which permit the application of up to two cubic feet per second of water for 70 acres instead of the one cubic foot per second for 70 acres that had been the law prior to the original litigation and upon which the Special Master and the Court expressly relied in formulating the Decree;

b. Depleting or permitting the depletion of natural flows of the North Platte River by allowing ground water which is hydrologically related to the North Platte River to be used to irrigate land which, when combined with land irrigated by direct surface water diversions, exceeds the requirements for 168,000 acres of irrigated land during any one irrigation season;

c. Depleting or permitting the depletion of storage water for uses not authorized by the Decree;

d. Failing to prepare and maintain complete and accurate records of the total area of land irrigated and the storage of waters of the North Platte River and its tributaries;

e. Depleting or permitting the depletion of return flows reaching the North Platte River; and

f. Depleting or permitting the depletion of natural flows by allowing additional consumption on tributaries entering the North Platte River below Alcova Reservoir.

3. The current and imminent actions of the State of Wyoming contravene the Court's decision and the Decree and invalidate the equitable balance of the North Platte River established by the Decree.

4. Despite the State of Nebraska's efforts to resolve these matters, the State of Wyoming has refused to alter its actions and it continues to violate the Decree.

5. The State of Wyoming's present and threatened violations of the Decree are causing and will cause irreparable injury to the State of Nebraska and its citizens.

6. The State of Nebraska has no effective remedy at law to enforce its rights against the State of Wyoming. Injunctive relief is necessary to enforce the Decree and to restrain further violations by the State of Wyoming.

WHEREFORE, the State of Nebraska prays that the Court enter its order construing the Decree and requiring the State of Wyoming to comply with the provisions of the Decree in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953), and enjoining the State of Wyoming from increasing its depletion of the storage water and natural flows of the North Platte River in violation of the State of Nebraska's apportionment under the Decree.

COUNT III

1. The Decree in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953), completely apportioned the natural flow of the North Platte River between the states of Nebraska and Wyoming during the irrigation season and partially during the non-irrigation season.

2. The United States is presently violating and threatens to violate the State of Nebraska's equitable apportionment established in the decision and Decree by:

a. Contracting for the use of Glendo Reservoir water for other than authorized purposes in the basin of the North Platte River in southeastern Wyoming below Guernsey Reservoir; and

b. Allocating natural flows among its contractors in designated water-short years. The Bureau of Reclamation allocates the total water supply, *i.e.*, storage and natural flows, contrary to ¶¶ V, VI, and XII.

3. The current and imminent actions of the United States contravene the Court's decision and the Decree and invalidate the equitable balance of the North Platte River established by the Decree.

4. Despite the efforts of the states of Nebraska and Wyoming to resolve these matters, the United States has refused to alter its actions and it continues to violate the Decree.

5. The United States' present and threatened violations of the Decree are causing and will cause irreparable injury to the State of Nebraska and its citizens.

6. The State of Nebraska has no effective remedy at law to enforce its rights against the United States. Injunctive relief is necessary to enforce the Decree and to restrain further violations by the United States.

WHEREFORE, the State of Nebraska prays that the Court enter its order construing the Decree and requiring the United States to comply with the provisions of the Decree in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953), and enjoining the United States from increasing its depletion of the storage water and natural flows of the North Platte River in violation of the State of Nebraska's apportionment under the Decree.

The allegations of each count of this amended petition are hereby incorporated and adopted by reference, as appropriate, for each other count.

Respectfully submitted,

DON STENBERG
Attorney General of Nebraska
Department of Justice
State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

RICHARD A. SIMMS

Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN
JAY F. STEIN

Simms & Stein, P.A.
446 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
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DON STENBERG
Attorney General of Nebraska
Department of Justice
State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN
JAY F. STEIN

Simms & Stein, P.A.
446 West San Francisco Street
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Santa Fe, New Mexico 87504
(505) 983-3880

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No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE AMENDED PETITION FOR AN APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS AND FOR THE ASSERTION OF NEW CLAIMS

INTRODUCTION

In 1986, the State of Nebraska moved for leave to file its petition to reopen *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953), in order to address violations of the Decree by Wyoming. Subsequently, the Court granted the motion for leave to file, the parties have undertaken discovery, the State of Wyoming filed a motion for summary judgment which was denied by the Special Master in his First Interim Report of Special Master, dated June 14, 1989, and Nebraska, Wyoming, Colorado, and the United States have filed cross-motions for summary judgment which are pending resolution before the Special Master.

Through the development of the proceedings, however, two unanticipated matters have become apparent. First, the equitable interests in Nebraska which have historically relied on the over-appropriated and unapportioned flows of the North Platte River are threatened by currently planned and future upstream development in Wyoming. Second, the resolution of the pending issues affects the unapportioned,

non-irrigation season flows which were left out of the Court's Decree in 1945. Nebraska therefore seeks to amend its petition to apportion the unapportioned, non-irrigation season flows of the North Platte River.

Additionally, events occurring subsequent to the filing of the original petition in October, 1986, have confirmed violations of the Decree by Wyoming and the United States. Also, discovery has uncovered violations of the Decree by Wyoming of which Nebraska was not previously aware. Therefore, Nebraska also seeks to amend its petition to allege that Wyoming is violating and threatening to violate the Decree by depleting or permitting the depletion of storage water and natural flows of the North Platte River by administering the river in a manner that circumvents certain injunctions in the Decree and by undermining the legal and physical conditions upon which the Decree is based. Further, Nebraska seeks to amend its petition to allege that the United States is violating and threatening to violate the Decree by depleting or permitting the depletion of storage water and natural flows of the North Platte River through its role in the administration of the river.

JURISDICTION

The Court has jurisdiction of this controversy pursuant to U.S. CONST. art. III, § 2, which provides: "In all Cases . . . in which a State shall be a Party, the Supreme Court shall have original jurisdiction," and 28 U.S.C. § 1251(a) (1988), which provides: "The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States." The Court also retained jurisdiction over this suit "for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy." 325 U.S. at 671. More specifically, the Court retained jurisdiction to consider any "change in conditions making modification of the decree or the granting of further relief necessary or

appropriate." *Id.* at 672. The motion for leave to amend the petition is predicated on such changes in conditions.

STATEMENT OF THE CASE

This litigation began in 1934 when Nebraska alleged that Wyoming was violating the rule of priority of appropriation interstate, thereby depriving Nebraska of water to which it was equitably entitled. *Id.* at 591-92. Nebraska sought an adjudication of the priorities of appropriations in both states, a determination of the equitable shares of each state, and an injunction restraining diversions in contravention of the priorities. *Id.* at 592. The Court ultimately resolved the matter by apportioning the natural flows of the North Platte River for irrigation uses during the irrigation season and, to ensure irrigation season water supplies, partially apportioning the North Platte River during the non-irrigation season by placing certain restrictions on water use and administration.[1] *Id.* at 665-72. The irrigation season is May 1 to September 30, and the non-irrigation season is October 1 to April 30.

Nebraska filed its motion for leave to file its petition to reopen this case on October 6, 1986. Nebraska alleged that Wyoming was then violating and was threatening to violate Nebraska's equitable apportionment established by the Decree by depleting the flows of the Laramie River, by constructing the proposed Deer Creek Project, and by actions of Wyoming officials to prevent the continued diversion of North Platte waters in Wyoming through the Interstate Canal for storage in the Inland Lakes in Nebraska.[2] The

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[1] The Court did not apportion storage water but instead left its administration to be governed by existing contracts. 325 U.S. at 621, 630, 639, 669, ¶ VI.

[2] *See* Nebraska's Motion for Leave to File Petition for an Order Enforcing Decree and for Injunctive Relief, Petition for an Order Enforcing Decree and for Injunctive Relief, and Brief in Support *(cont'd)*

Court granted Nebraska's motion and on March 18, 1987, Wyoming filed its answer and a counterclaim.[3] The case was referred to Mr. Owen Olpin as Special Master on June 22, 1987.

Four motions for intervention were filed in 1987. Each was denied by the Special Master in his Seventh Memorandum, issued on April 1, 1988, in which the movants were allowed to participate as *amici curiae*.

Wyoming filed a motion for summary judgment on September 11, 1987, seeking a summary resolution of the entire case, except its counterclaim. Shortly after Wyoming's motion was filed, the Special Master effectively stayed the matter until the pending motions for intervention were decided. In August of 1988, Nebraska, the United States, and the Platte River Whooping Crane Critical Habitat Maintenance Trust ("Platte River Trust") filed responses opposing Wyoming's motion for summary judgment. On March 2, 1989, the Special Master issued his Tenth Memorandum denying each element of Wyoming's motion. The Special Master reported his decisions regarding intervention and summary judgment to the Court in his First Interim Report of Special Master, dated June 14, 1989. Wyoming did not file exceptions to the Report, and the Court accepted it for filing without modification.

While Wyoming's motion for summary judgment was pending, Nebraska filed a motion for leave to file an amended petition to seek an express apportionment for fish and wildlife interests below Tri-State Dam.[4] *See infra* p. 36-

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of Motion for Leave to File Petition for an Order Enforcing Decree and for Injunctive Relief, October 6, 1986.

[3] *See* Wyoming Answer to Petition, Motion for Leave to File Counterclaim and Counterclaim, March 18, 1987.

[4] *See* Nebraska's Motion to Amend Petition for an Order Enforcing Decree and for Injunctive Relief, Amended Petition for an Order Enforcing Decree, for Injunctive Relief, and for Modifi- *(cont'd)*

37. The Court denied Nebraska's motion on March 7, 1988. This motion to amend bears no relation to the motion of January 11, 1988.

Between 1989 and 1991, extensive discovery was conducted by all parties. The complete evidentiary record of the original litigation in *Nebraska v. Wyoming*, involving 24 trial segments between 1936 and 1941, was reviewed. The original transcript was computerized as a result of the joint efforts of Nebraska, Wyoming, and the United States. Original files were also retrieved from various state and federal agencies and archives. Original litigation materials included correspondence, attorney notes, expert witness draft materials, transcripts, pleadings, and exhibits.

Based on the review of the historical data, cross-motions for summary judgment were filed by Nebraska, Wyoming, Colorado, and the United States in March, 1991, relating to all aspects of the case. Oral argument was heard on June 7 and 8, 1991, and the cross-motions for summary judgment are under consideration by the Special Master.

STATEMENT OF FACTS

1. The North Platte River was only partially apportioned during the non-irrigation season.

The equitable apportionment accomplished in 1945 pertained only to irrigation uses. 325 U.S. at 591. The Decree was designed to provide Nebraska, Wyoming, and Colorado each with its equitable share of the North Platte River during the irrigation season. However, to ensure the irrigation season supply, some injunctions had to be placed on activities during the non-irrigation season. In fashioning the relief, the Court completely apportioned the natural flows of the North Platte River between the states of Nebraska

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cation of the Decree, and Brief in Support of Motion to Amend Petition for an Order Enforcing Decree and for Injunctive Relief, January 11, 1988.

and Wyoming during the irrigation season and partially apportioned the North Platte during the non-irrigation season. The Court specified the State of Colorado's apportionment in its entirety, covering both the irrigation and non-irrigation seasons.

Specifically, in relation to the non-irrigation season, the Court enjoined Wyoming against storing or permitting the storage of more than 18,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries above Pathfinder Reservoir between October 1 of any year and September 30 of the following year.[5] *Id.* at 665-66, ¶ II(b). On a year-round basis, Wyoming was also enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe, Alcova, and Glendo reservoirs other than in accordance with their relative storage rights established in the Decree.[6] *Id.* at 666, ¶ III, *modified*, 345 U.S. at 983-84, ¶ 3(c).

Colorado is enjoined against storing or permitting the storage of more than 17,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries in Jackson County, Colorado, between October 1 of any year and September 30 of the following year. 325 U.S. at 665, ¶ I(b). Colorado is also restricted from exporting out of the basin of the North Platte River and its tributaries in Jackson County, Colorado, to any other stream basin or basins, more than 60,000 acre feet of water in any period of ten consecutive years reckoned in a continuing progressive series. *Id.*, ¶ I(c).

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[5]October 1 of one year to September 30 of the following year is considered one water year.

[6]The Decree does allow water to be impounded or released from Seminoe Reservoir contrary to the stated priority to generate electric power when such storage or releases will not materially interfere with the administration of water for irrigation purposes according to the priorities decreed for the French Canal and the State Line Canals. 325 U.S. at 666, ¶ III, *modified*, 345 U.S. at 983-84, ¶ 3(c).

Finally, during certain months of the non-irrigation season, Nebraska was adjudged, as part of its entitlement to the waters of the North Platte River for the North Platte Project, the right to accrue and to store 46,000 acre feet of natural flow during the months of October, November, and April, with a priority of December 6, 1904.[7] 325 U.S. at 595, 604, 612-13, 615, 625, 629, 646, 649; Report of Michael J. Doherty, Special Master ("Doherty Report") at 30, 34, 60-61, 66, 86-87 (Table XVII), 101.

2. The geographical scope of the irrigation season apportionment was limited to the area above Tri-State Dam because of the abundance of return flows below the dam.

The geographical scope of the original litigation involved the entire North Platte River flowing through Colorado, Wyoming, and Nebraska. *See* Appendix 1. It also involved a section of the Platte River in Nebraska, 180 miles in length, for a combined total river length of nearly 820 miles. Doherty Report at 20. The hydrology of the entire river and the history of the changes in the river were carefully analyzed because both were critical to the question of an adequate water supply for irrigation in the various river sections.

The Special Master and the Court recognized the importance of the North Platte Project for its impact on the hydrology of the river. First, the North Platte Project completely altered the natural regimen of the North Platte and Platte rivers. Second, it captured and utilized natural flows, originating principally from snow melt, and flood flows for use during the irrigation season. Third, the North

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[7]The Inland Lakes' apportionment is at issue in the pending action. However, Special Master Olpin has indicated that he has tentatively decided to rule in favor of Nebraska's and the United States' motions for summary judgment with respect to the Inland Lakes. Both motions sought to clarify the rights of the Inland Lakes for non-irrigation season storage.

Platte Project provided vast quantities of return flows downstream. The Court found that downstream "return flows increased from a negligible quantity in 1911 to 700,000 acre feet in 1927."[8] 325 U.S. at 596; *see also* Doherty Report at 32-33.

In addition, there were two projects further downstream that influenced the water supply in the lower river, *viz.*, the Sutherland Project and the Tri-County (Lake McConaughy) projects. *See* Appendix 1. Sutherland Reservoir stores irrigation water for 75,000 acres. The Tri-County Project was designed to hold 2,000,000 acre feet of water and to irrigate 205,000 acres of land in Nebraska. 325 U.S. at 597; *see also* Doherty Report at 36.

Although Nebraska originally sought an adjudication of priorities and an apportionment downstream to Grand Island, Nebraska, it later withdrew its initial claim for direct diversions of natural flows for irrigation uses below Bridgeport, Nebraska. 325 U.S. at 607; *see also* Doherty Report at 92. This change in position was attributable to two things: The abundant return flows which entered the North Platte River in Nebraska which resulted from direct diversions at and above Tri-State Dam and the construction of the Tri-County and Sutherland projects which were believed to provide adequate water for irrigation uses downstream from their location. Doherty Report at 92 n. 2. Even though Nebraska eventually withdrew some of the downstream aspects of its claim, the Master heard extensive evidence on the Tri-County Project and its prospective operation. *Id.* at 96-99. He concluded that with the new project in place there would be adequate water for irrigation uses downstream of Lake McConaughy. *Id.* at 99.

[8] Recent history supports the accuracy of the Court's analysis. Between 1946 and 1987, 736,000 acre feet of return flows have entered the North Platte River on an average annual basis between Tri-State Dam and Bridgeport, Nebraska.

There was still a dispute, however, regarding the Tri-State Dam to Bridgeport section. Nebraska claimed that upstream water was needed to supply canals in that reach with adequate irrigation water. Special Master Doherty disagreed with Nebraska and concluded that the canals in that section were "so well supplied from return flows and other local sources that the section [could] be omitted from any consideration of interstate distribution." *Id.* at 92.

Nebraska took exception to the Master's conclusion. The Court upheld the Master's finding that there was an adequate water supply between Tri-State Dam and Bridgeport for irrigation and that users in this reach could not call on upstream water. 325 U.S. at 607, 654-55. The Court agreed with the Master that in addition to adequate water from return flows and other local sources, at least 81,700 acre feet would continue to pass Tri-State Dam during the irrigation season. *Id.*; *see also* Doherty Report at 96. In sum, the North Platte River below Tri-State Dam was excluded from the irrigation season apportionment because of the return flows that resulted from the North Platte Project.

3. The unapportioned, non-irrigation season flows entering Nebraska from Wyoming are fundamental to equitable reliance in Nebraska.

During the non-irrigation season, all of the currently unapportioned water in the river below Guernsey Dam flows into Lake McConaughy.[9] The reservoir has a capacity of nearly 2,000,000 acre feet, and is located in western Nebraska above the confluence of the North Platte and South Platte rivers. Kir sley Dam, which forms Lake McConaughy, was completed in 1941. The dam and reservoir were expressly planned and designed to capture the non-

[9] Guernsey, along with Glendo, Alcova, Pathfinder, and Seminoe reservoirs, normally close their gates during the non-irrigation season in order to store natural flow for use during the irrigation season. Therefore, most of the accurals to the river above Guernsey Reservoir are captured by upstream reservoirs.

irrigation season flows, the return flows of the North Platte Project, and any other unused flows that were transported to that reach of the river. The average annual inflow into Lake McConaughy between 1946 and 1987 was 1,105,000 acre feet. Kingsley Dam is a structure through which all subsequent downstream flows are controlled. When Lake McConaughy does not have a sufficient water supply, downstream equities are adversely affected.

The primary sources of water entering Lake McConaughy are the inchannel natural flows from Wyoming that pass Tri-State Dam, the diversion dam just downstream of the Wyoming-Nebraska state line, and the return flows between Tri-State Dam and Bridgeport that result from the diversion of irrigation water above Tri-State Dam. The inchannel natural flows passing Tri-State Dam are primarily accretions to the river below Guernsey Reservoir. The return flows which enter the river between Tri-State Dam and Bridgeport are derived primarily from diversions to canals at or above Tri-State Dam. When water is applied to farmland upstream during the irrigation season, part of the unused water percolates into the ground as part of the hydrologic cycle. The unconsumed water reappears in the river system downstream at a later point in time and is called return flow. During the non-irrigation season the inchannel flows averaged 197,400 acre feet for the years 1946-1987. Return flows in the Tri-State Dam to Bridgeport section of the river during the non-irrigation season were 342,400 acre feet on an annual average basis, 1946-1987. Thus the non-irrigation season inflow to Nebraska from Wyoming averaged 539,800 acre feet annually, 1946-1987.

4. The flows entering Nebraska during the irrigation season which are derived from the regimen of the North Platte River created by the Decree are fundamental to equitable reliance in Nebraska.

During the irrigation season the inchannel natural flows passing Tri-State Dam averaged 150,100 acre feet between 1946 and 1987, a period including numerous years of high flow. When the original suit was litigated, Special Master Doherty and the Court recognized that at least 81,700 acre feet of natural flow, calculated during the drought period, 1931-1940, would continue to pass Tri-State Dam during the irrigation season due to circumstances beyond anyone's control. 325 U.S. at 607, 655; *see also* Doherty Report at 95-96. However, Nebraska now faces the loss of these flows. In 1989, a retrofit of the Tri-State Dam was completed which resulted in essentially stopping all irrigation season natural flows passing Tri-State Dam, with the exception of flood flows.

Also during the irrigation season direct diversions to canals at or above Tri-State Dam have resulted in 393,600 acre feet of net return flows below Tri-State Dam on an annual average basis during the irrigation season, 1946-1987. In sum, 543,700 acre feet of inflows have entered Nebraska from Wyoming during the irrigation season 1946-1987.

ARGUMENT

POINT I

THE APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS IS AN APPROPRIATE ACTION IN THE COURT'S ORIGINAL JURISDICTION

To invoke the Court's original jurisdiction under U.S. CONST. art. III, § 2, Nebraska must establish that it is not a nominal party and that the amended petition presents a justiciable "case or controversy." *See, E.g., Texas v. Florida*, 306 U.S. 398 (1939); *Oklahoma ex rel. Johnson v. Cook*, 304

U.S. 387, 392-93 (1938); *New York v. Illinois*, 274 U.S. 488, 490 (1927).

It should be clear that Nebraska is not a "nominal" party, actually representing private interests. *See Jones ex rel. Louisiana v. Bowles*, 322 U.S. 707 (1944); *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387 (1938); *Oklahoma v. Atchison, T. & S.F.Ry. Co.*, 220 U.S. 277 (1911). Nebraska's interests embrace agricultural, municipal, industrial, recreational, environmental, and fish and wildlife uses along the North Platte and Platte rivers. Moreover, the Court has been extremely liberal in recognizing the quasi-sovereign interests of a state in equitable apportionment actions. In its most recent decision on the subject, the Court permitted an equitable apportionment action predicated on a water right owned by a single corporation within the plaintiff state.[10] *See*

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[10] The Court held:

> New Mexico also contends that Colorado is improperly suing directly and solely for the benefit of a private individual — C.F. & I. — in violation of the Eleventh Amendment, and that Colorado's suit is barred by laches. We find no merit to these claims.
>
> Because the State of Colorado has a substantial interest in the outcome of this suit, New Mexico may not invoke its Eleventh Amendment immunity from federal actions by citizens of another State. The portion of the Vermejo River in Colorado is owned by the State in trust for its citizens. Colo. Const., Art. XVI, § 5. While C.F. & I. will most likely be the primary user of any water diverted from the Vermejo River, other Colorado citizens may jointly use the water or purchase water rights in the future. In any event, Colorado surely has a sovereign interest in the beneficial effects of a diversion on the general prosperity of the State. Faced with a similar set of circumstances in *Kansas v. Colorado*, 206 U.S. 46, 99 (1907), we concluded that "[t]he controversy rises . . . above a mere question of local private right and involves a matter of state interest and must be considered from that standpoint."

Colorado v. New Mexico, 459 U.S. at 182 n.9.

Colorado v. New Mexico, 459 U.S. 176 (1982). The initial decision in this case makes it clear that Nebraska is not a nominal party in this case.

The question of whether an interstate dispute over conflicting rights in an interstate stream presents a justiciable case or controversy in the original jurisdiction of the Supreme Court was answered in the first Arkansas River dispute. *See Kansas v. Colorado*, 185 U.S. 125 (1902). In that case Kansas filed suit against Colorado to enjoin the diversion of water historically flowing across the state line. *Id.* at 145-46. The jurisdiction of the Court was disputed by Colorado. The Court held:

> Without subjecting the bill to minute criticism, we think its averments sufficient to present the question as to the power of one State of the Union to wholly deprive another of the benefit of water from a river rising in the former and, by nature, flowing into and through the latter, and that, therefore, this court, speaking broadly, has jurisdiction.

Id. at 145.

The same principle has guided the Court's other decisions in accepting equitable apportionment cases. As the Court summarized in *Colorado v. New Mexico*:

> Equitable apportionment is the doctrine of federal common law that governs disputes between States concerning their rights to use the water of an interstate stream. *Kansas v. Colorado*, 206 U.S. 46, 98 (1907); *Connecticut v. Massachusetts*, 282 U.S. 660, 670-671 (1931). It is a flexible doctrine which calls for "the exercise of an informed judgment on a consideration of many factors" to secure a "just and equitable" allocation. *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945).

Colorado v. New Mexico, 459 U.S. at 183. Nebraska's amended petition falls squarely within this precedent.

The second question is whether the Court should exercise it original jurisdiction. Original jurisdiction is exercised "sparingly." *United States v. Nevada*, 412 U.S. 534, 538 (1973). It is limited to "appropriate cases." *Illinois v. City of Milwaukee*, 406 U.S. 91, 93-94 (1972); *see also Arizona v. New Mexico*, 425 U.S. 794 (1976). Perhaps the best statement of the Court's determination of an "appropriate case" is when "recourse to that [original] jurisdiction . . . is necessary for the States' protection." *Washington v. General Motors Corp.*, 406 U.S. 109, 113 (1972), quoting *Massachusetts v. Missouri*, 308 U.S. 1 (1939). Arguably, such a condition is met solely by a well pleaded petition for equitable apportionment. *See Nebraska v. Wyoming*, 325 U.S. 589 (1945); *New Jersey v. New York*, 283 U.S. 336 (1931); *Connecticut v. Massachusetts*, 282 U.S. 660 (1931); *Wyoming v. Colorado*, 259 U.S. 419 (1922). The Court should exercise its original jurisdiction in this instance to protect the State of Nebraska's interests.

The Court should grant Nebraska's motion for leave to file and take jurisdiction over this equitable apportionment controversy for any one of the following three, independent bases: 1) The North Platte River is over-appropriated; 2) there is downstream reliance jeopardized by actual and threatened development in Wyoming; and 3) the pending original action requires jurisdiction over non-irrigation flows to fully resolve related issues.

1. Conflicting claims between states to an over-appropriated river create a justiciable original action.

In *Nebraska v. Wyoming*, the Court indicated that conflicting claims between states to a fully appropriated river in and of itself created a justiciable controversy under U.S. CONST. art. III, § 2:

> But *Wyoming v. Colorado, supra*, indicates that where the claims to the water of a river exceed the supply a controversy exists appropriate for judicial determination. If there were a surplus of unappropriated water, different considerations would be applicable. Cf. *Arizona v. California*, 298 U.S. 558. But where there is not enough water in the river to satisfy the claims asserted against it, the situation is not basically different from that where two or more persons claim the right to the same parcel of land. The present claimants being States, we think the clash of interests to be of that character and dignity which makes the controversy a justiciable one under our original jurisdiction.

325 U.S. at 610. The holding could well be construed as law of the case, applicable to future proceedings under the Court's retained jurisdiction. *Id.* at 672; *compare United States v. United States Smelting Co.*, 339 U.S. 186, 198-99 (1950).

Downstream equities in Nebraska have not had an adequate water supply for some time, and competition is intense for the limited supply that is available. Ongoing litigation between agricultural interests and environmental interests within the State of Nebraska demonstrates the severity of tne problem. *See infra* p. 34-35. For nearly ten years, operators of Lake McConaughy and environmental groups have battled over the use of flows stored in Lake McConaughy which are derived from unappropriated, non-irrigation season flows, undiverted irrigation season natural flows passing the state line, and return flows. Nearly $20 million have been spent by litigants contesting the administration and use of the finite downstream water supply. The level of Lake McConaughy is nearing an all time low. Environmental interests claim that their needs have not been met in 48 out of the last 50 years. Irrigators using natural flows have experienced water shortages and resulting economic impacts, and they are threatened with further shortfalls.

In addition to the downstream intrastate competition for water, upstream developments threaten to lessen the available supply. Proposed developments in Wyoming would reduce the water coming into Nebraska, further exacerbating the problem. Less water is entering the state, thus reducing

McConaughy inflows, and increased demands are being made on the water which is available.

Both Nebraska and Wyoming claim the right to use the non-irrigation season water supply without limit. There is not sufficient water to satisfy all existing demands, quite aside from proposed new depletions. Accordingly, the polar claims of the states of Nebraska and Wyoming over the over-appropriated, non-irrigation season flows of the North Platte provide an independent basis for the exercise of original jurisdiction.

2. The threat to downstream equities by upstream development is the basis for the exercise of the Court's original jurisdiction.

Wyoming's actual and threatened depletions of the unapportioned flows of the North Platte River present the classic equitable apportionment conflict, *i.e.*, the threat to downstream equities posed by upstream development. *See Colorado v. New Mexico*, 459 U.S. 176 (1982); *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Washington v. Oregon*, 297 U.S. 517 (1936); *Wyoming v. Colorado*, 259 U.S. 419 (1922). The best statement appears in *Wyoming v. Colorado*:

> The contention of Colorado that she as a State rightfully may divert and use, as she may choose, the waters flowing within her boundaries in this interstate stream, regardless of any prejudice that this may work to others having rights in the stream below her boundary, can not be maintained. The river throughout its course in both States is but a single stream wherein each State has an interest which should be respected by the other. A like contention was set up by Colorado in her answer in *Kansas v. Colorado* and was adjudged untenable. Further consideration satisfies us that the ruling was right.

Wyoming v. Colorado, 259 U.S. at 466.

In this case, Nebraska possesses a broad spectrum of equities dependent on non-irrigation season flows. They are jeopardized by actual and threatened developments in Wyoming. Traditional economic uses and fish and wildlife uses have developed in Nebraska based upon the unapportioned, non-irrigation season flows and the regimen of the North Platte River established by the Decree. Equities in Nebraska which rely on Lake McConaughy for their water supply are many. From an economic stand-point, the most important is irrigation. The water that is stored in the reservoir is used during the irrigation season to supplement or fully irrigate 230,000 acres of land each year.[11] The associated annual economic benefits to the State of Nebraska are a $16.1 million increase in net returns to the irrigators and a $53.7 million increase in economic activity resulting from the sale of additional agricultural production.

The hydroelectric power revenues which are generated from water stored behind Kingsley Dam and subsequent reuse of McConaughy waters are also economically significant. Power production occurs during the irrigation season and during the non-irrigation season. There is a series of generating units, including Kingsley Hydro, North Platte Hydro, Jeffrey Hydro, and Johnson Hydros #1 and #2. Together, these hydroelectrical power units generate an annual average of 550,000 megawatt hours of power that is worth $8.2 million to electric consumers in Nebraska.

Municipal water use of the North Platte and Platte rivers is also critical in Nebraska. Various municipalities have well fields in the alluvium of the river that draw water on an annual basis. Because of increasing ground water contamination in areas where municipal well fields used to be located, more and more towns and cities are turning to the river for a fresh and uncontaminated water supply. Re-

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[11] Both the Central Nebraska Public Power and Irrigation District and the Nebraska Public Power District have lands served by water from Lake McConaughy.

cently, the cities of Grand Island and Kearney have located well fields in the river alluvium to avoid otherwise contaminated water. Flows in the river are needed to assure dependable water supplies for municipalities. The unapportioned, non-irrigation season flows are an important component of the water supply for municipal and domestic uses.

Recreational uses also rely on the currently unprotected flows of the North Platte River and the regimen of the river as it presently exists during the irrigation season. In the summer, there are stream-based and reservoir-based recreational activities along the North Platte and Platte rivers. Nearly a dozen reservoirs fill from water previously impounded in Lake McConaughy. Camping, boating, and fishing are all primary summer activities that take place at aquatic areas. Fall recreation is primarily hunting and fishing. Recreation related to the North Platte and Platte rivers and associated reservoirs is estimated to have generated 7.8 million visitor days per year. Platte River Valley recreation is valued by recreationalists at $34 million annually and produces new spending within Nebraska of $16.2 million a year. Further, monies received from visitors who come to Nebraska to witness the annual waterfowl and bird migrations are substantial. The Platte River is a major stop-over in the central flyway for scores of migratory birds during the spring and fall migrations. These events have been successfully promoted and the region has received national and international recognition. It is estimated that 80,000 people came to the Central Platte region to view the crane and waterfowl spring migration in 1991. Estimated direct economic benefit from these visitors was about $15 million and the economic activity generated by this spending is estimated to be $40.5 million.[12]

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[12] Economic Impact of Crane-Watching in Central Nebraska, Lingle Gary, Platte River Whooping Crane Maintenance Trust, 6th Crane Workshop, Oct. 2, 1991.

Finally, in an area in which it may be difficult to assign economic values, fish and wildlife are a beneficiary of unapportioned, non-irrigation season flows and the irrigation season regimen of the North Platte River. All water which currently flows into Nebraska is important to support minimum stream flows for the Platte River. The riparian habitat within a three-mile corridor within the reach between Lexington and Denman, Nebraska, has been declared as critical habitat for the federally endangered whooping crane. In addition, a larger, 150 mile stretch along the Platte River provides an important habitat for six other federally endangered or threatened species, as well as the staging area and migratory habitat for 80% of the world's sandhill crane population.[13] Decreased flows will cause habitat degradation and could cause the extinction of some species.

The average annual value of the equities in Nebraska that rely on the unapportioned, non-irrigation season flows and the irrigation season regimen of the North Platte River include: $16.1 million in increased net returns to irrigators, $34 million in recreation benefits, $8.2 million in hydropower benefits, and an increase in state economic activity of nearly $70 million per year from the spending associated with irrigation and recreation. The equities are many, and the associated loss from the reduction of flows below Tri-State would be great.

Nebraska's equities are threatened by Wyoming's proposals for upstream development which would utilize and consume non-irrigation season flows. Wyoming has a state funded Water Development Program administered by the Wyoming Water Development Commission. An express purpose of the program is to "develop and preserve Wyoming's water . . . ." WYO. STAT. § 41-2-112 (1977). To guarantee the success of the program, the State of Wyo-

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[13] Endangered and threatened species include the Whooping Crane, Bald Eagle, Least Tern, Piping Plover, American Burying Beetle, Eskimo Curlew, and the Western Prairie Fringed Orchid.

ming assured that the program is well-funded. The program is funded through general appropriations and an excise tax on coal, oil and gas. Total revenues since 1977 exceed $433,000,000, and total expenditures exceed $255,000,000. The program presently has $67,000,000 available for appropriation, and the Development Commission has recommended expenditures of $24,000,000. With these abundant resources, the Commission has done an aggressive job of promoting water development projects in Wyoming in the North Platte River Basin, including the Laramie River.

Through formal discovery, Nebraska has become aware of numerous water development projects in Wyoming in the North Platte River Basin. Projects identified by Wyoming include the Bates Creek Project, Deer Creek Project, Box Elder Creek Project, Wagonmound Creek Project, LaBonte Creek Project, Horseshoe Creek Project, Corn Creek Project, McIntosh Project, Rawlins Project, Seminoe Enlargement, Robertson-McConnell Project, Edgerton Midwest Project, Sandy Lakes Project, Casper-Alcova Project, Horse Creek Project, Natrona County Regional Project, Tisthammer Project, and the Wy Coal Gas Project. Further, Wyoming identified seven general water planning/development reports, seven reports related to the proposed Deer Creek Project, three reports related to the Seminoe Enlargement, five reports related to the Edgerton Midwest Project, three reports related to the Corn Creek Project, one report related to Sandy Lakes, three reports related to the Casper Alcova Project, one report related to the Horse Creek Project, one report related to the Natrona County Project, two reports related to the Tisthammer Reservoir, and one report related to the Wy Coal Gas Project. Wyoming describes the status of these projects as "under construction," "construction pending," "planning," "feasibility," "idea," "on hold," or "inactive." Some of these projects are the subject of the pending action and others are being watched closely by Nebraska. However, from the volume of proposed projects in the North Platte

River Basin in Wyoming, the reason for Nebraska's apprehension is apparent.

The present conflict between the downstream equities currently relying on non-irrigation season water and the proposed and threatened upstream water developments in Wyoming makes the need to equitably apportion the unapportioned, non-irrigation season flows immediate and critical.

3. In order to fully resolve interrelated issues in the pending action, the unapportioned, non-irrigation season flows must be apportioned.

The pending issues regarding irrigation season flows and violations of the Decree must be examined by the Court in relation to the availability and use of non-irrigation season flows. *Cf. In Re Glaser*, 198 U.S. 171 (1905); *In Re Massachusetts*, 197 U.S. 482 (1905). There is an integral hydrologic continuity between the flows of the non-irrigation season and the irrigation season. Likewise, there is a hydrologic continuity between water use upstream and residual flows downstream. Nearly five decades have passed since the Decree was entered, and downstream equities are relying on the regimen of the river created by the Decree and the unapportioned, non-irrigation season flows. All of Wyoming's activities that Nebraska alleges violate the Decree during the irrigation season also have resulting impacts during the non-irrigation season. In order to fully resolve the pending issues, it is necessary to apportion the unapportioned flows of the North Platte River.

In its pending petition, Nebraska alleges that Wyoming is violating and threatens to violate the Decree through actions Wyoming is taking in relation to the Laramie River, the proposed Deer Creek Project, and Nebraska's Inland Lakes apportionment. In its counterclaim, Wyoming placed in dispute Nebraska's use of natural flow for Nebraska's canals in the Whalen/Tri-State Dam reach of the North Platte River. The resolution of each of these four issues will have a significant effect on the non-irrigation season flows.

a. Development on the Laramie River, in the form of Grayrocks Reservoir, Corn Creek Reservoir, and other future development, has and will continue to deplete non-irrigation season flows upon which Nebraska relies and to which it is equitably entitled.

In relation to the Laramie River, the State of Nebraska alleges in its pending petition that Wyoming is presently violating and threatens to violate the State of Nebraska's equitable apportionment established in the Decree by depleting the flows of the North Platte River by the operation of Grayrocks Reservoir and by depleting the flows of the North Platte River by the proposed construction of additional river pumping, diversion, and storage facilities at the confluence of the Laramie and the North Platte rivers. While the petition asserts that Grayrocks and Corn Creek are depleting or potentially depleting Laramie River flows, Wyoming answered generally by stating that Nebraska has no right to Laramie waters at all and if it had a right it is estopped from asserting it. Accordingly, as defined by Wyoming's answer, the Laramie issue is broader than the project-specific allegations in the complaint.

The basic issue framed by the pleadings is whether Nebraska was apportioned 75% of the Laramie River's contribution to the North Platte River under conditions prevailing in 1945 or whether Wyoming can dewater the Laramie at its mouth. The Laramie River has contributed an average of 62,050 acre feet annually to the North Platte River during the irrigation season, 1946-1987. In addition, the average annual contribution of the Laramie River to the North Platte River during the non-irrigation season has been 39,600 acre feet, 1946-1987. Because a significant amount of water from the Laramie River flows into the North Platte River, the resolution of the issue that is currently before the Court, *i.e.*, each state's entitlement to the Laramie, will have a major impact on the equities in

Nebraska which rely on upstream, non-irrigation season flows.

The pending Laramie River issues implicate the non-irrigation season flows in several ways. One relates to the Grayrocks Dam and Reservoir. On November 24, 1976, the State of Nebraska filed suit in the United States District Court for the District of Nebraska against the Rural Electrification Administration and two individuals. In April of 1977, the National Wildlife Federation, the National Audubon Society, and the Nebraska Wildlife Federation intervened as plaintiffs. Additional plaintiffs intervened in August, 1977. Basin Electric Power Cooperative, along with other entities, intervened as defendants in November, 1977. The City of Lincoln also intervened as a defendant in December, 1977. In a related action filed on April 13, 1978, the State of Nebraska, the National Audubon Society, and the Nebraska Wildlife Federation filed suit against Colonel Ray, District Engineer of the United States Army Corps of Engineers, in his official capacity. On April 24, 1978, the Basin Electric Power Cooperative was joined as a defendant.

The two suits were consolidated, with the plaintiffs seeking to enjoin the construction of Grayrocks Dam and Reservoir under various statutory claims, including claims under the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370b (1988 & Supp. 1989), and the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1988 & Supp. 1989). The consolidated cases were decided at the district court level on October 23, 1978. Judgment was entered in favor of Nebraska and the intervening parties plaintiff. *See Nebraska v. Rural Electrification Administration*, 12 E.R.C. 1156 (D. Neb. 1978).

By an Agreement of Settlement and Compromise dated December 4, 1978, the action was settled and dismissed on appeal. *Nebraska v. Rural Electrification Administration*, 594 F.2d 870 (8th Cir. 1979). As part of the Agreement of Settlement and Compromise, Basin Electric guaranteed certain non-irrigation season, minimum instream flow releases

on the Laramie River down to its confluence with the North Platte River for downstream wildlife protection.

Although encouraged to participate, the State of Wyoming did not become a party to the litigation or to the Agreement of Settlement and Compromise of December 4, 1978, and has repeatedly asserted that it is not bound by either. To the contrary, Wyoming maintains that it has the right to dry up the Laramie River at its mouth, not only between May 1 and September 30 of each year, but also between October 1 and April 30 of each year. Wyoming's claim includes the right to totally diminish the guaranteed minimum releases required by the Agreement of Settlement and Compromise, which Wyoming acknowledges are not protectable under Wyoming law. The State of Wyoming's refusal to be bound by the Grayrocks Agreement has precluded certainty in the use of the non-irrigation season flows of the North Platte River.

Another pending issue which affects the non-irrigation season flows is the proposed Corn Creek Project, planned for construction in the Laramie River Basin. The Corn Creek Irrigation District is situated in Goshen County, Wyoming, and extends south of the confluence of the Laramie and North Platte rivers. On July 24, 1974, the District's predecessor contracted with the Basin Electric Power Cooperative on behalf of the Missouri Basin Power Project for the future delivery of 22,500 acre feet annually from Grayrocks Reservoir. Additional water supplies would come from new depletions of the Laramie and North Platte rivers. The most recent information of which Nebraska is aware indicates that the proposed project consists of a surface water diversion system, a 75 c.f.s. pump station at the confluence of the Laramie and North Platte rivers, a storage reservoir, and a pipeline distribution system. As is recognized in ¶ 5 of the Agreement of Settlement and Compromise, the proposed diversion of Laramie River water to the Corn Creek Irrigation District would undermine the tributary inflow to the North Platte between

Whalen and the state line which has historically entered Nebraska during the non-irrigation season.

Generally, in relation to the pending litigation, Wyoming has claimed the right to 100% of the flows of the Laramie River throughout the year. Wyoming's allegation obviously implicates more than just the irrigation season apportionment made pursuant to the Decree; it also implicates unapportioned, non-irrigation season water, a matter not yet addressed by the Court. Resolution of the pending Laramie River issues will necessarily determine non-irrigation season entitlements between the two states. The Court should recognize the relation between the pending issues and the unapportioned flows and deal with the two related problems at the same time rather than implicitly deciding the apportionment question without expressly addressing it.

b. The proposed Deer Creek Project will deplete non-irrigation season flows which are currently relied upon in Nebraska and to which Nebraska is entitled.

Nebraska alleges in its original petition that Wyoming is presently violating and threatens to violate the State of Nebraska's equitable apportionment established in the Decree by depleting the natural flows of the North Platte River by the proposed construction of storage capacity on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir. Wyoming has proposed to construct the Deer Creek Dam and Reservoir on Deer Creek, a tributary of the North Platte River located between Pathfinder Dam and Guernsey Dam. Pursuant to ¶ XIII(c) of the Decree, the impact of any construction of additional storage capacity in this reach of the river is subject to analysis before construction commences. While the pending action has focused on depletions that the Deer Creek Project would cause during the irrigation season above Tri-State Dam, there would also be depletions during the non-irrigation season below Tri-State Dam. In

order to fully resolve the Deer Creek issue, there should be an apportionment of non-irrigation season flows.

Two methods of operating Deer Creek have been modelled. Each operating scenario shows that Deer Creek will cause significant depletions. However, depending on which model is used, the effects are manifest in different geographical areas. The North Platte River Simulation Model ("NPRSM") was a computer model created by Wyoming for one purpose — to obtain a § 404 permit for the proposed Deer Creek Project. The model was designed to portray the impacts of Deer Creek on the North Platte River under certain pre-determined conditions. It did not attempt to simulate the real-world hydrology of the North Platte River in order to predict the effects of the operation of Deer Creek. Instead, the NPRSM used what normally would be simulated output, *i.e.*, flows passing Tri-State Dam, as a fundamental input parameter. Apparently, Wyoming's objective was to portray minimal depletions on flows below the Tri-State Dam for a specific reason, *viz.*, to obtain a favorable Biological Opinion from the United States Fish and Wildlife Service ("FWS").

Pursuant to the federal permitting process, the FWS was required to conduct an analysis and write a Biological Opinion evaluating the impacts of Deer Creek on endangered and threatened species before a § 404 permit could be issued. Because there are several endangered or threatened species below Tri-State Dam, depletions to flows below that point are critical. If the adverse impacts on endangered or threatened species below Tri-State Dam reached a threshold level, the FWS would issue a "jeopardy opinion," and the related federal permit could not be issued. However, if the depletions were minimal, the FWS would issue a "non-jeopardy opinion," and Wyoming could obtain the § 404 permit.

Realizing the need to show a minimal amount of depletions in flows past Tri-State Dam, Wyoming backed into its computer model by using output as a fundamental input

parameter. Wyoming thereby held the reduction in flows past Tri-State Dam to 1050 to 1300 acre feet per year. However, in reducing depletions below Tri-State Dam to avoid a jeopardy opinion, Wyoming translated the significant depletions of Deer Creek upstream to the federal storage reservoirs. Under the NPRSM, the end-of-year carryover storage for both the Pathfinder and Kendrick ownerships is reduced respectively by as much as 9,400 acre feet and 77,000 acre feet.

In short, the NPRSM reduced depletions below Tri-State Dam at the expense of significant depletions on upstream federal storage reservoirs. Neither the Corps of Engineers nor the FWS was concerned with Deer Creek's affect on the federal storage reservoirs. Therefore, the large depletions in upstream reservoir storage were of no significance to Wyoming in obtaining its § 404 Permit. In the administrative forum, Wyoming deliberately diminished the impacts at Tri-State Dam, while ignoring depletions on upstream federal storage reservoirs.

The Deer Creek issue is now in this judicial forum in which the Court must assess how Deer Creek affects the interests of Nebraska and the United States. In conjunction with the present litigation — and quite aside from the contrived results of the NPRSM — a computer model has been developed by Nebraska which simulates the *actual* operation and administration of the North Platte River and the associated facilities. The Deer Creek Project was evaluated by simulating the operation of Deer Creek within the system with a junior priority. Under this operating scenario, the depletions on the upstream federal storage reservoirs are much less, while there are much greater impacts on flows below Tri-State Dam.

Wyoming's tactic has been to play both ends against the middle. While Wyoming argues on one hand that it must operate the Deer Creek Project pursuant to the NPRSM according to its state and federal permits, it argues on the other hand that according to Nebraska's model, Deer

Creek's primary impacts are below Tri-State Dam, an area in which Wyoming believes it can freely deplete the river without violating the Decree, while there would be comparatively little impact on upstream federal storage reservoirs. Wyoming can either transfer the impacts of Deer Creek to the flows below Tri-State Dam in an attempt to avoid violating the Decree or it can transfer the impacts to the federal reservoirs in an attempt to avoid jeopardizing the critical habitat of endangered and threatened species. It cannot do both.

The method of operation is vital to assessing the effects of Deer Creek. The Project must be considered in relation to its effect on the non-irrigation season flows in order to fully resolve the Deer Creek matter. The apportionment of non-irrigation season flows is directly relevant to the feasibility of Deer Creek. Significant effects of the proposed Project occur during the non-irrigation season. Under some operational scenarios, the effects are much greater than in others. Depending on how the equities are balanced in order to arrive at an equitable apportionment, Wyoming may or may not be entitled to deplete the non-irrigation season flows past Tri-State Dam. Determining the non-irrigation season equitable apportionment should be a prerequisite to a complete evaluation of the feasibility of Deer Creek.

c. Wyoming's attempt to curtail storage of non-irrigation season flows to the Inland Lakes affects and depletes Nebraska's non-irrigation season water supply.

In its original petition, Nebraska alleges that Wyoming is presently violating and threatens to violate Nebraska's equitable apportionment established in the Decree by actions of Wyoming state officials to prevent the United States Bureau of Reclamation's continued diversion of North Platte waters in Wyoming through the Interstate Canal for storage in the Inland Lakes in Nebraska for the benefit of water users in the State of Nebraska. The State of Wyoming's action in

this regard also threatens non-irrigation season flows of the North Platte River to which Nebraska is equitably entitled. Since the entry of the Decree, the State of Nebraska has relied on the apportioned, non-irrigation season flows for the Inland Lakes for irrigation, recreation, and for waterfowl, fish, and game habitat at Lake Minitare, Lake Alice, Little Lake Alice, and Winters Creek Lake.

d. The resolution of the pending counterclaim will affect non-irrigation season flows in Nebraska.

Wyoming's counterclaim directly implicates and threatens further depletions of the non-irrigation season flows of the North Platte River to which Nebraska is equitably entitled. In its counterclaim, Wyoming alleges that Nebraska has circumvented the Decree and continues to do so by demanding natural flow for diversion by irrigation canals at and above Tri-State Dam in excess of the beneficial use requirements of those canals. Wyoming wrongly equates beneficial use with certain irrigation "requirements" which Special Master Doherty utilized in determining the proper proportion split for the apportionment in the Whalen Dam to Tri-State Dam reach. In essence, Wyoming is seeking to restrict Nebraska to arbitrary limitations on the application of North Platte water to beneficial use on lands in Nebraska served by canals diverting at or above Tri-State Dam.

As previously explained, the direct irrigation season diversions which enter canals at or above Tri-State Dam are the primary source of water below Tri-State Dam. *See supra* p. 9-11. When water is utilized for irrigation of crops by upstream canals, only a portion of the water is consumed. A significant amount of the water re-enters the river system in the form of return flows. If the diversions to the upstream canals are arbitrarily limited, there will be a resulting decrease in the return flows below Tri-State Dam. Because of the direct relationship between direct irrigation season diversions and non-irrigation season return flows, it is essential to examine both together. It is necessary to apportion

the non-irrigation season flows in order for any certainty to exist for downstream use.

POINT II

EQUITABLE APPORTIONMENT PRESENTS A JUSTICIABLE CONTROVERSY

In assessing this motion for leave to file, the standards for the exercise of original jurisdiction and the standards for relief on the merits must be kept distinct. The two are not the same and have been sharply distinguished by the Court in determining whether to accept an equitable apportionment case.

In *Ohio v. Kentucky*, 410 U.S. 641 (1973), the Court defined the purpose of a motion for leave to file: "Under our rules, the requirement of a motion for leave to file a complaint, and the requirement of a brief in opposition, permit and enable us to dispose of matters at a preliminary stage." *Id.* at 644. This procedure tests the legal sufficiency of a petition by disposing of threshold legal issues.

By contrast, the traditional standard for relief on the merits in an original equitable apportionment action is that there must be clear and convincing evidence that the actions of a state are of a serious magnitude and fully and clearly proven before the Court will intervene and enjoin the actions of another state. *See generally Colorado v. New Mexico*, 459 U.S. 176, 187-88 n. 13 (1982); *Colorado v. Kansas*, 320 U.S. 383, 393-94 (1943). *Accord Washington v. Oregon*, 297 U.S. 517, 522 (1936); *Connecticut v. Massachusetts*, 282 U.S. 660, 669 (1931); *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923); *New York v. New Jersey*, 256 U.S. 296, 309 (1921); *Missouri v. Illinois*, 200 U.S. 496, 521 (1906). This determination is made by the Court, however, after it has granted the motion for leave to file and after the evidence has been heard.

The Court has rejected the concept that factual issues must be fully developed in the preliminary stages of an original action. The weighing of untested evidence to determine success on the merits is not a factor in determining whether to grant a motion for leave to file. The Court does "not pause to consider the scope of the relief which it might be possible to accord on such a bill." *Kansas v. Colorado*, 185 U.S. 125, 145 (1902). As indicated in Point I, a well pleaded action for equitable apportionment meets the Court's test for justiciability because it necessarily includes the concepts of an "imminent threat" of "serious injury."[14] *See supra* p. 11-16. The Court has repeatedly held that a fully appropriated river in which downstream equities are threatened by actual or proposed upstream development necessarily invokes sovereign rights and creates the "clash of interests . . . which makes the controversy a justiciable one under [the Court's] original jurisdiction." *Nebraska v. Wyoming*, 325 U.S. at 610. *See also Colorado v. New Mexico*, 459 U.S. 176 (1982); *Washington v. Oregon*, 297 U.S. 517 (1936); *Wyoming v. Colorado*, 259 U.S. 419 (1922); *Kansas v. Colorado*, 206 U.S. 46 (1907). Further, as the Court said in *Kansas v. Colorado*: "The disagreement, coupled with its effect upon a stream passing through the two States, makes a matter for investigation and determination by this court." *Kansas v. Colorado*, 206 U.S. 46, 95-96 (1907).

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[14] There is no additional requirement that the state seeking equitable apportionment must demonstrate that the threatened injury is "imminent" or attempt a factual showing of "necessity." Language to that effect in *Alabama v. Arizona*, 291 U.S. 286 (1934), arose from a completely different and considerably more abstract context. In that case, Alabama sought to enjoin five other states from enforcing their statutes against the sale of products made from prison labor as a deprivation of its interstate market in prison manufactured products. The Court properly found that the factual allegations of injury to be highly speculative and insufficiently pled. *Id.* at 291. The ruling has no precedential effect on the clearly discernable impacts arising from the competition for interstate water.

POINT III

THE SOLE FORUM TO RESOLVE EQUITABLE APPORTIONMENT ISSUES IS THE SUPREME COURT

The Court has traditionally declined to exercise its original jurisdiction where an "appropriate" alternative forum exists. *See Arizona v. New Mexico*, 425 U.S. 794 (1976); *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972). In previous pleadings, Wyoming and Basin Electric have suggested that alternative forums are available for the resolution of discrete issues. However, the sole appropriate forum in which to allocate interstate waters is the Supreme Court of the United States. There is no alternative forum aside from a legislative apportionment. The Court has expressly reserved issues of equitable apportionment for its original jurisdiction.

In *Hinderlider v. La Plata & Cherry Creek Irr. Co.*, 304 U.S. 92 (1938), the Court confirmed that equitable apportionment forms an element of "federal common law:"

> For whether the water of an interstate stream must be apportioned between the two States is a question of "federal common law" upon which neither the statutes nor the decisions of either State can be conclusive. *Kansas v. Colorado*, 206 U.S. 46, 95, 97-98; *Connecticut v. Massachusetts*, 282 U.S. 660, 669-71; *New Jersey v. New York*, 283 U.S. 336, 342-43; *Washington v. Oregon*, 297 U.S. 517, 528. Jurisdiction over controversies concerning rights in interstate streams is not different from those concerning boundaries. These have been recognized as presenting federal questions.

Hinderlinder, 304 U.S. at 110. *See also Kansas v. Colorado*, 206 U.S. at 46, 98 (1907). The federal common law of equitable apportionment presents an overriding federal interest calling for the application of a uniform rule of decision. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421-27 (1964); *see also Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943). *See generally D'Oench, Duhme &*

Co. v. Federal Deposit Ins. Corp., 315 U.S. 447 (1942). Maintaining a uniform rule of decision is not possible in a variety of alternative forums. The original jurisdiction of the Supreme Court is required.

Moreover, the alternative forum exception to accepting jurisdiction is subject to an important qualification. In *Kansas v. Colorado*, 185 U.S. 125 (1902), the Court emphasized that it had exclusive jurisdiction over matters properly within its jurisdiction: "The original jurisdiction of this court over 'controversies between two or more States' was declared by the judiciary act of 1789 to be exclusive, as in its nature it necessarily must be." *Kansas v. Colorado*, 185 U.S. at 139; *see* 28 U.S.C. § 1251(a) (1988). An equitable apportionment can only be accomplished by the Court; piecemeal proceedings in scattered forums will not suffice.

There are several state and federal actions or proceedings currently in progress that potentially affect the downstream regimen of the river.[15] At the state level, the Central Platte Natural Resources District has applied for an instream flow permit from the State of Nebraska for certain reaches of the Platte River.[16] Hearings have just concluded to determine if an instream flow permit is required, and if so, what quantity of water is appropriate. If an instream flow is

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[15] These proceedings do not present alternatives forums for the resolution of issues of equitable apportionment.

[16] A Natural Resources District is a political subdivision of the State of Nebraska responsible for planning and executing programs and facilities relating to: 1) Erosion prevention and control; 2) prevention of damages from floodwater and sediment; 3) flood prevention and control; 4) soil conservation; 5) water supply for any beneficial uses; 6) development, management, utilization, and conservation of ground and surface water; 7) pollution control; 8) solid waste disposal and sanitary drainage; 9) drainage improvement and channel rectification; 10) development and management of fish and wildlife habitat; 11) development and management of recreational and park facilities; and 12) forestry and range management.

granted, the right receives a present-day and therefore a relatively junior priority. The permit has been applied for pursuant to Nebraska state law and is being adjudged by its standards. *See* NEB. REV. STAT. §§ 46-2, 107 to 2, 119 (Reissue 1988).

In an unrelated matter, Central Nebraska Public Power and Irrigation District has applied to the State of Nebraska to amend its state water right permits to allow it to store and release water from Lake McConaughy for recreational, and fish and wildlife purposes. Presently, its state permits encompass only agricultural and hydropower production purposes. While the district's proposed amendments to its state water rights permits were occasioned by pending Federal Energy Regulatory Commission ("FERC") proceedings, discussed *infra*, they will be evaluated and ruled on as a matter of Nebraska state law. NEB. REV. STAT. § 46-233, *et seq.* (Reissue 1988).

On a federal level, the FERC relicensing of Kingsley Dam has taken the spotlight. *See supra* p. 15. The operators of Lake McConaughy began the procedures to relicense their hydropower project in 1984. Environmental interests intervened, seeking to secure the release of certain minimum instream flows from Lake McConaughy for fish and wildlife, including federally endangered and threatened species. Several federal laws are implicated by this proceeding, including the Federal Power Act of 1920 (originally the Federal Water Power Act), 16 U.S.C. § 792-828c (1988 & Supp. 1989), the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370b (1988 & Supp. 1989), and the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1988 & Supp. 1989). Based upon the claims asserted to date before FERC, it appears that there is not enough water in Lake McConaughy on an average annual basis to satisfy the needs of both irrigation interests and environmental interests. Either one interest or the other — most likely both — will end up with insufficient water supplies. This dispute implicates only the demand for water that finds its

way into Lake McConaughy. No resolution of the FERC proceeding can affect the available upstream water supply.

Also on the federal level, the United States Bureau of Reclamation has recently begun an evaluation of its facilities and their operations on the North Platte, South Platte, and Platte rivers in Nebraska, Wyoming, and Colorado, in consultation with the United States Fish and Wildlife Service. The § 7 consultation is mandated by the Endangered Species Act and is designed to assess the impacts of the federal projects on endangered and threatened species' habitat. The final results of the studies associated with this consultation are not expected to be completed for several years. It is unclear how the results of these studies could affect the management of federal facilities or the regimen of the river.

All of the described proceedings or actions are operating independently of one another and on different timetables. At least three out of four of these actions are solely intrastate in nature and will serve to divide a limited water supply among competing interests within the State of Nebraska. None of these forums performs the function of the Court in the case of two states competing over a limited water supply, *viz.*, an equitable apportionment of the unapportioned, non-irrigation season flows of the North Platte River between Nebraska and Wyoming.

Nebraska does not seek to have the Court enter into "intramural disputes" within the State of Nebraska over the allocation of its water resources, nor does it believe that doing so would be prudent. *See, e.g., New Jersey v. New York*, 345 U.S. 369, 373 (1953). Nebraska only seeks to have the Court balance the equities between the states and determine each state's equitable share of the unapportioned flows. Only then can each state manage its internal affairs with certainty.

POINT IV

THIS MOTION IS DISTINCT FROM NEBRASKA'S FIRST MOTION TO AMEND PETITION

Nebraska filed a motion for leave to file an amended petition for an order enforcing the Decree and for injunctive relief on January 11, 1988. The amended petition recited the Decree, the equitable apportionment, and the Court's retention of jurisdiction in ¶ XIII(f) of the Decree in regard to any change in conditions warranting modification or further relief. Based on the assertion that the apportionment for irrigation water diverted at or above Tri-State Dam in the Decree implicitly established a regimen of stream flow for uses below Tri-State, the amended petition asked the Court to "construe the Decree," albeit that it apportioned irrigation water, as apportioning the same water for the maintenance of critical wildlife habitat and as placing restrictions on Colorado's and Wyoming's authority to approve new appropriations. In effect, the Court was asked to construe an apportionment for irrigation as an apportionment for environmental interests. The relief requested in the amended petition was also limited to the decreed apportionment, *i.e.*, the irrigation season flows.

In the alternative, Nebraska asked the Court to modify the Decree "to recognize and provide for changes in the conditions of the North Platte River . . . that would result" from new, upstream appropriations. The actual changes were not articulated. The Court was also requested to modify the Decree to recognize the need for the protection of critical wildlife habitat as a result of post-Decree, federal and state legislation. The amended petition did not set out the facts upon which the "need" for protection allegedly arose.

The brief in support of the motion was more explicit, stating that equity requires that the apportionment recognize that the responsibility of protecting wildlife habitat should not be left to just one of the states. Nebraska argued

that equity requires the Court to take cognizance of post-Decree laws designed to further environmental interests and "to spread the burden of protecting critical wildlife habitat throughout the North Platte River Basin."

This amended petition is quite different from the one filed in 1988. The 1988 amended petition sought relief for fish and wildlife interests during the irrigation season. It asked the Court to construe or modify the Decree to consider post-Decree developments. By contrast, the present motion presents a classic equitable apportionment of the previously unapportioned, non-irrigation season flows. All equities in Nebraska and Wyoming will be considered and equitably balanced in relation to one another. The Court only partially apportioned non-irrigation season flows in the original litigation. Nebraska is seeking to complete the apportionment of the North Platte River which was partially accomplished in the original proceedings in order to provide certainty in the ongoing, intrastate proceedings in both state and federal forums in Nebraska.

POINT V

THE STATE OF WYOMING AND THE UNITED STATES ARE VIOLATING THE DECREE BY DEPLETING THE STORAGE WATER AND NATURAL FLOWS OF THE NORTH PLATTE RIVER

Counts II and III of the amended petition allege further violations of the Decree by Wyoming, and for the first time, violations of the Decree by the United States. These counts seek to further construe and enforce the apportionment made to the State of Nebraska pursuant to *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953), and to enjoin the State of Wyoming's and the United States' continued and threatened violations of the Decree.

Under FED. R. CIV. P. 15(a), leave to amend pleadings is intended to be freely given. *See Foman v. Davis*, 371 U.S.

178 (1962); *see also Verhein v. South Bend Lathe, Inc.*, 598 F.2d 1061 (7th Cir. 1979); *Longbottom v. Swaby*, 397 F.2d 45 (5th Cir. 1968). Insofar as amendments to the complaint are concerned, the objective is to give the plaintiff "a chance to test his claim on the merits." *Middle Atlantic Utilities Co. v. S.M.W. Development Corp.*, 392 F.2d 380, 384 (2d Cir. 1968). Accordingly, where the amended complaint states a valid cause of action its filing should normally be granted. *See Gaffney v. Silk*, 488 F.2d 1248 (1st Cir. 1973). This policy extends to the introduction of an entirely new cause of action. *See Jenn-Air Products Co. v. Penn Ventilator, Inc.*, 283 F. Supp. 591 (E.D. Pa. 1968); *Sperberg v. Firestone Tire & Rubber Co.*, 61 F.R.D. 78 (N.D. Ohio 1973); see 3 J.W. Moore, R.D. Freer, MOORE'S FEDERAL PRACTICE ¶ 15.08 [2] (2d ed. 1991).

The impediment is prejudice or unfair surprise. *See Toth v. USX Corp.*, 883 F.2d 1297 (7th Cir. 1989). As shown in Point VI, no prejudice will result to the defendants because they will not be prevented from presenting a responsive case. *See infra* p. 39-42. Under this circumstance, the majority rule is that amendments to the complaint prior to trial should be allowed. *See Granus v. North American Philips Lighting Corp.*, 821 F.2d 1253 (6th Cir. 1987); *R.E.B., Inc. v. Ralson Purina Co.*, 525 F.2d 749 (10th Cir. 1975); *P.S.G. Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 417 F.2d 659 (9th Cir. 1969).

As previously discussed, the Decree apportions the waters of the North Platte River among the states of Nebraska, Wyoming, and Colorado. The State of Wyoming is violating and threatens to violate the Decree by depleting the flows of the North Platte River by irrigating acres in excess of the amount authorized, storing water in excess of the amount authorized, inaccurate reporting of irrigated acres and water stored, excessive diversions, including diversions in excess of beneficial use, unauthorized use of storage water, and modifying the legal and physical conditions upon which the Decree was based. The United States is violating and

threatens to violate the Decree by depleting the flows of the North Platte River by unauthorized use of storage water and unauthorized allocations of natural flow. These violations of the Decree disrupt the equitable balance of the river and deprive the State of Nebraska of its lawfully established entitlement under the Decree.

The State of Wyoming's and the United States' unlawful actions will cause the State of Nebraska to suffer substantial economic, ecological, and environmental injuries. Initial analyses of the economic impact of the present and imminent depletion of the flows of the North Platte River apportioned to the State of Nebraska show substantial annual losses in the form of increased power costs, lost farm income, decreased value of agricultural production, and decreased statewide economic output. These adverse economic impacts are in addition to, and do not include, the economic impacts set forth in Nebraska's original petition.

POINT VI

EXERCISE OF THE COURT'S ORIGINAL JURISDICTION IS NECESSARY TO PREVENT SEVERE PREJUDICE TO THE CITIZENS OF NEBRASKA AND WYOMING

In original actions there is a compelling policy in favor of full development of the facts. *See United States v. Texas*, 339 U.S. 707, 715 (1950). *See also Oklahoma v. Texas*, 253 U.S. 465, 471 (1920); *Kansas v. Colorado*, 185 U.S. 125, 144-45, 147 (1902); *United States v. Texas*, 162 U.S. 1 (1896). The exercise of original jurisdiction should therefore be regarded as comprehensive, embracing all issues in a cause of action.

The Court has been forced to revisit several controversies, including three equitable apportionments, to settle unresolved issues. *See, e.g., Oklahoma v. Texas*, 253 U.S. 465 (1920) and *United States v. Texas*, 339 U.S. 707 (1950); *Kansas v. Colorado*, 206 U.S. 46 (1907), *Colorado v. Kansas*,

320 U.S. 383 (1943), and *Kansas v. Colorado*, No. 105, Original; *Wyoming v. Colorado*, 259 U.S. 419 (1922), *Wyoming v. Colorado*, 286 U.S. 494 (1932), *Wyoming v. Colorado*, 298 U.S. 573 (1936), and *Wyoming v. Colorado*, 309 U.S. 572 (1940); and *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *Nebraska v. Wyoming*, 345 U.S. 981 (1953), and the present case, No. 108, Original. In this instance, there is no reasonable basis upon which to accept only certain issues in an original action while neglecting to address related issues. Such a circumstance would result in severe prejudice to the party states and their citizens and to the *amici*. Further, it would effectively defeat the policy of resolving original actions with judicial economy. As stated in Point III, the Court is the appropriate forum to determine equitable apportionment issues. *See supra* p. 32-35.

Supreme Court Rule 17.2 states that the Federal Rules of Civil Procedure "when their application is appropriate, may be taken as a guide to procedure in an original action in this Court." Federal Rule of Civil Procedure 15(a) provides that amendments to pleadings "be freely given when justice so requires." Amendments should be granted in the absence of bad faith or a dilatory motive. *See Leased Optical Departments-Montgomery Ward, Inc. v. Opti-Center, Inc.*, 120 F.R.D. 476 (D.N.J. 1988). There must be a specific showing of substantial prejudice to deny an amended pleading. *See Procter & Gamble Co. v. Nabisco Brand, Inc.*, 125 F.R.D. 405 (D. Del. 1987); *Ozark Air Lines, Inc. v. Delta Air Lines, Inc.*, 63 F.R.D. 69 (N.D. Ill. 1974). Delay by itself does not constitute prejudice. *See, e.g., Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594 (5th Cir. 1981); *Davis v. Piper Aircraft Corp.*, 615 F.2d 606 (4th Cir. 1980); *Cornell & Co., Inc. v. Occupation Safety and Health Review Comm'n*, 573 F.2d 820 (3d Cir. 1978).

"Prejudice" has a precise meaning under FED. R. CIV. P. 15(a). It affects a party's ability to present its case. As the court stated in *Cuffy v. Getty Refining & Marketing Co.*, 648 F. Supp. 802 (D. Del. 1986):

> Prejudice does not mean inconvenience to a party. Moreover, it is obvious that an amendment, designed to strengthen the movant's legal position, will in some way harm the opponent. In the context of a 15(a) amendment, prejudice means that the nonmoving party "must show that it was unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the ... amendments been timely." *Heyl & Patterson Intern.*, 663 F.2d at 426.

Cuffy v. Getty Refining and Marketing Co., 648 F. Supp. at 806.

Prejudice has been construed to include unfair surprise. *See Pilotti v. Mobil Oil Corp.*, 565 A.2d 1227 (Pa. Super. 1989). It may include the extra costs of repeated delays which impair a party's ability to proceed. *See Andrews v. Government of Virgin Islands*, 132 F.R.D. 405, 412 (D. Virgin Islands 1990). It has included the introduction of a new set of operative facts or an effort to amend the pleadings after discovery has closed. *See Diduck v. Kaszycki & Sons Contractors, Inc.*, 737 F. Supp. 792 (S.D.N.Y. 1990). Whatever the particular circumstance, the unifying factor is "whether the opposing party was denied a fair opportunity to defend and to offer additional evidence on that different theory. [citing] *Universe Tankships, Inc. v. U.S.A.*, 528 F.2d 73, 76 (3d Cir. 1975) ...." *Evans Products Co. v. West American Ins. Co.*, 736 F.2d 920, 924 (3d Cir. 1984).

No prejudice would result from accepting Nebraska's amended petition. Although the case was originally filed in October of 1986, what will have occurred with the Special Master's report and recommendations on the pending cross-motions for summary judgment will be the separation of triable issues of fact from the matters conducive to summary judgment. *See supra* p. 3-5. Neither the plaintiff, the defendants, nor the *amici* have spent substantial resources in developing the factual sides of their defenses. Trial segments have not been scheduled, and they will not be set until the cross-motions for summary judgment are resolved by the Court sometime next year. Because of the necessary

schedule on the pending legal issues, all parties and *amici* will have more than a sufficient opportunity to investigate the factual claims and to gather evidence in support of or in defense of the allegations. The introduction of additional allegations of violations of the Decree by Wyoming and the United States at this stage of the proceedings will not deny any party or *amici* a fair opportunity to defend against the allegations in the amended petition. Nor will the apportionment of unapportioned, non-irrigation season flows. To the contrary, resolving the entitlements of the states to the non-irrigation season flows will facilitate the resolution of all of the pending issues.

In this case, justice and equity require that the amended petition be allowed. Nebraska has not demonstrated bad faith or a dilatory motive. Neither Wyoming nor the United States will be unfairly disadvantaged and neither will be deprived of an opportunity to present facts or evidence which it would have offered had the proposed amendments come sooner. The amended petition would not unduly complicate this litigation, but rather would clarify the parties' rights and responsibilities, and it would eliminate the present uncertainty related to the entitlements of the states to the North Platte River.

CONCLUSION

There is no question whether the Court has jurisdiction over the amended petition. The question is whether the Court should exercise its jurisdiction to allow the parties to address the matters raised in the amended petition.

Similar amendments were recently allowed in two other original actions, *viz. Kansas v. Colorado,* Original No. 105, and *Oklahoma and Texas v. New Mexico,* Original No. 109. In the former, the complaint was amended twice over a four year period to allow the assertion of additional compact violations and to add a prayer for damages after the Court's decision in *Texas v. New Mexico,* 482 U.S. 124 (1987). In

Oklahoma and Texas v. New Mexico, the complaint was amended to facilitate an allegation that arose out of an initial adverse decision by the Special Master.

In 1945, the Court left some of the flows of the North Platte River unapportioned. With respect to those flows, there was no justiciable controversy at the time — only the recognition in the Court's retention of jurisdiction that conditions would likely change. Conditions have changed, and the Court should exercise its jurisdiction over the amended petition in order to resolve the present-day, remainder of the case.

Respectfully submitted,

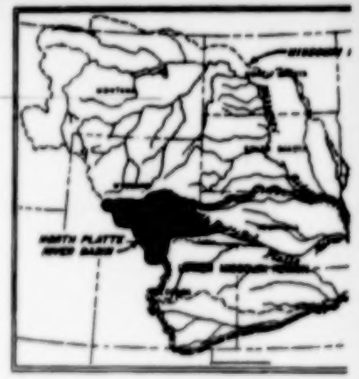
DON STENBERG
Attorney General of Nebraska
Department of Justice
State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN
JAY F. STEIN

Simms & Stein, P.A.
446 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880

APPENDIX 1



LOCATION MAP

KENDRICK PROJECT

GREY REEF RES.

ALCOVA RES.

PATHFINDER RESERVOIR

SEMINOE RESERVOIR

GLENDO RESERVOIR

GUERNSEY RESERVOIR

NORTH PLATTE PROJECT

WYOMING NEBRASKA

WYOMING COLORADO

EXPLANATION

EXISTING TRANSMOUNTAIN DIVERSIONS

A City of Cheyenne Water Supply System

B

C

D

E Laramie - Poudre Tunnel

F

G

H

Reservoir

Diversion Data

Canal

Powerplant

Irrigated Land

BEST AVAILABLE COPY